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In the
Supreme Court of the United States

KENTUCKY ASSOCIATION OF HEALTH PLANS, INC., ET AL.,
Petitioners,

v.

JANIE MILLER, COMMISSIONER OF THE KENTUCKY DEPARTMENT OF INSURANCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF TEXAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, KENTUCKY, MARYLAND, OKLAHOMA, UTAH AND WEST VIRGINIA, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Are state "Any Willing Provider" statutes preempted by ERISA, or are they saved from preemption because they are laws "which regulate insurance"?

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INTEREST OF THE *AMICI CURIAE*

The state *amici curiae*, through their Attorneys General, submit this brief in support of Kentucky Department of Insurance Commissioner Janie Miller. States have a vital interest in ensuring that the scope of preemption by the Employee Retirement Income Security Act of 1974 (ERISA) is not extended beyond Congress' intent. The text of ERISA and decisions of this Court evidence that Congress intended to reserve powers to the States. Specifically, the ERISA insurance saving clause, 29 U.S.C. § 1144(b)(2)(A), preserves the States' authority to regulate insurers. Last Term this Court again affirmed that health maintenance organizations (HMOs) are insurers subject to state insurance regulation. *Rush Prudential v. Moran*, 122 S.Ct. 2151, 2163 (2002). Petitioner HMOs[1] attempt to distinguish between insurance laws regulating benefits (which supposedly can be saved) and laws regulating an insurers' other activities (which supposedly cannot be saved). The HMOs base that strained dichotomy on *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)—an antitrust case. In doing so, they mistakenly equate the "business of insurance" antitrust exemption with ERISA's preservation of laws which "regulate insurance." Their argument contradicts this Court's decisions holding the McCarran-Ferguson factors to be guideposts. *See Rush*, 122 S.Ct. at 2163; *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 373 (1999). Accordingly, the Sixth Circuit's decision should be affirmed.

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[1] Petitioners are a Kentucky-based association of HMOs and several individual HMOs. They are referred to herein simply as "the HMOs."

SUMMARY OF ARGUMENT

This Court's precedents directly proscribe the narrow saving clause test that the HMOs advance. In *UNUM Life Insurance Co. of America v. Ward*, 526 U.S. 358 (1999), this Court unanimously held that the ERISA saving clause saves California's common-law notice-prejudice rule. This Court rebuffed UNUM's claims that the rule did not spread risk. Nevertheless the HMOs now claim that a law must spread risk to qualify as an *insurance practice* that comes within the saving clause. Pet. Br. at 17. That argument defies common sense and imposes the first McCarran-Ferguson factor as a litmus test—which this Court has already rejected.

Essentially, the HMOs engraft a dichotomy between laws regulating insurance benefits and laws regulating insurers' other activities. They assert that the former are insurance practices that can be saved, while the latter are beyond the scope of insurance regulation, as that term is defined in the saving clause. Interestingly, that argument is the exact opposite of the argument Metropolitan Life advanced in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). There, Metropolitan Life claimed that only state laws that directly regulate insurers and their business activities come within the ERISA saving clause. The Court rejected Metropolitan Life's narrow reading. The HMOs' narrow reading in this case should likewise be rejected.

Finally, the HMOs contend that *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), directs that Kentucky's Any Willing Provider law

cannot be saved. That argument incorrectly limits the ERISA saving clause to the McCarran-Ferguson antitrust exemption. But the text and the purposes of those two laws are different. This Court should again affirm that the McCarran-Ferguson factors are relevant guideposts—not a rigid test that must be met as the HMOs contend. The Sixth Circuit's decision should be affirmed.

ARGUMENT

A. The Narrow Reading of the ERISA Saving Clause that the HMOs Advance Ignores this Court's Precedents.

The Sixth Circuit correctly held that Kentucky's Any Willing Provider (AWP) law regulates insurance and, consequently, is saved from ERISA preemption.[2] The Circuit's analysis correctly asked first whether Kentucky's law regulates insurance from a "common sense view of the matter" and only then "consider[ed] three factors . . . used in the McCarran-Ferguson Act." *Ky. Ass'n of Health Plans,*

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[2] The state *amici* have not addressed the application of the three McCarran-Ferguson factors to Kentucky's AWP law because they agree with the Respondent and the majority of the circuits that AWP laws meet at least two of the three factors. *See Stuart Circle Hosp. Ass'n v. Aetna Health Mgmt.*, 995 F.2d 500, 502–04 (4th Cir. 1993) (holding Virginia's law saved); *Tex. Pharmacy Ass'n v. Prudential Ins. Co. of Am.*, 105 F.3d 1035, 1038 (5th Cir. 1997) (holding, pre-*Ward*, Texas's AWP law preempted because it meets two of the three McCarran-Ferguson factors).

Inc. v. Nichols, 227 F.3d 352, 363 (2000) (quoting *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 367–68 (1999)). The HMOs challenge that the Sixth Circuit reads the ERISA saving clause too broadly and that this Court's guidance is not so clear.

The HMOs contend that the ERISA saving clause is only meant to save a sliver of state insurance regulation—those laws aimed at *insurance practices*, but not those laws regulating insurers' other activities. Pet. Br. at 13 (emphasis in original). Inventively, they suggest that the common-sense test saves state laws only when those laws regulate the spreading and underwriting of a policyholder's risk. *Id.* at 30 n.13. Moreover, in direct contradiction to this Court's precedents, the HMOs argue that the McCarran-Ferguson Act is a litmus test[3] rather than a "guidepost" for determining when the ERISA saving clause save state insurance regulations. *Id.* at 13. These arguments run afoul of this Court's precedents and gloss over the substantive distinctions between the McCarran-Ferguson Act and ERISA.

[3] The "guidepost" factors are whether the law spreads risk, is an integral part of the policy relationship, and is limited to entities within the insurance industry. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (involving whether a health insurer's use of a peer-review committee was exempt from federal antitrust laws).

1. ERISA's Initial Common-Sense Test Does Not Exempt HMOs and other Insurers from Following State Insurance Regulations.

Although the ERISA express-preemption clause, 29 U.S.C. § 1144, snuffs out laws that "relate to" employee benefit plans, Congress expressly saved state insurance laws from that preemptive force. In almost antithetically broad language, Congress provided that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. §1144(b)(2)(A). Through this provision, Congress expressed its intent that States continue to exercise their traditional powers in the field of insurance. Regardless whether a state statute "relates to" an ERISA plan, the "ERISA plan is . . . bound by state insurance regulations insofar as they apply to the plan's insurer." *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

Faced with the "unhelpful" language in these two clauses, this Court has recently reaffirmed the starting presumption that Congress intended to not supplant the historic police powers of the States. *Rush*, 122 S.Ct. at 2159; *see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 331–32 (1997); and *DeBuono v. NYSA-ILA Med. & Clinical Serv. Fund*, 520 U.S. 806, 814 (1997). Where, as here, Congress expresses its intent to save from preemption state laws that regulate insurance, there is

no basis to impose a restrictive interpretation of the clause. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S.724, 745 (1985). A narrow, artificial reading of the term "regulates insurance" would be inconsistent with that intent, and finds no support in the language of the saving clause or ERISA generally.

In *Metropolitan Life*, the Court rejected a narrow interpretation of the savings clause. 471 U.S. at 745. Rather, this Court took a "common-sense" view of the term "regulates insurance" in determining whether a state law is saved from ERISA preemption. 471 U.S. at 740. The issue as defined by this Court, is not whether a particular state law meets specific criteria, but whether the law regulates an insurance relationship, insurance contract or insurer. Such laws are at the "core of the insurance business." *Sec. & Exch. Comm. v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969).

In an interesting juxtaposition to this case, Metropolitan Life argued in the *Metropolitan Life* case that only state laws that directly regulate insurers and their business activities come within the ERISA saving clause—the mirror-opposite stance taken by the HMOs in this case. 471 U.S. at 741. Metropolitan Life claimed that state laws regulating the substantive terms of an insurance contract were recent innovations more properly seen as health laws and, therefore, outside the scope of the saving clause. *Id.* This Court, however, rejected Metropolitan Life's distinction because it "reads the saving clause out of ERISA entirely." *Id.*

Thus, in *Metropolitan Life*, 471 U.S. at 740, this Court held that a state law mandating that insurance companies provide certain coverages "regulates insurance" as a matter of common-sense and was thus saved from preemption. This Court reasoned that the state mandated-benefit law was a law regulating the terms of an insurance contract and that Congress expressly reserved the regulation of insurance contracts to the States. In determining whether Congress intended for laws regulating insurance contracts to be within the scope of laws preserved by the saving clause, this Court referred to the deemer clause.

The "deemer clause" states that an employee-benefit plan should not be deemed to be an insurance company "for purposes of any laws of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies or investment companies." 29 U.S.C. §1144(b)(2)(B). This Court reasoned that "[b]y exempting from the saving clause laws regulating insurance contracts that apply directly to benefit plans, the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause." *Metropolitan Life*, 471 U.S. at 71. The reference to insurance companies in the deemer clause makes equally clear Congress' intent to save from preemption state laws that regulate insurers.[4]

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[4]The Court implicitly recognized this in *Metropolitan Life* when it discussed examples of laws that regulate insurers. *Metropolitan Life*, 471 U.S. at 728, n.2.

Likewise, in *UNUM Life Insurance Co. of America v. Ward*, 526 U.S. 358 (1999), this Court held that California's notice-prejudice rule regulated insurance and was saved from ERISA preemption. 526 U.S. at 368. This Court observed that the California rule was directed specifically at insurers and their contracts. *Id.* (citing *Cisneros v. UNUM Life Ins. Co. of Am.*, 134 F.3d 939, 945 (9th Cir. 1998) (the common-law rule "is directed specifically at the insurance industry and is applicable only to insurance contracts.")). The unanimous Court highlighted that the McCarran-Ferguson Act "guideposts" are "relevant" "considerations [to be] weighed" in determining whether a state law regulates insurance. 526 U.S. at 373–74 (citations omitted). But the McCarran-Ferguson factors were never intended to form a litmus test for the saving clause's applicability.

Furthermore, this Court unanimously upheld California's notice-prejudice rule without analyzing whether California's rule spread risk. *Ward*, 526 U.S. at 374. Saying flatly, "[w]e need not pursue this point," this Court found the common-law rule to be a common-sense insurance regulation that met the two other McCarran-Ferguson factors. Arguing that the spreading and underwriting of a policyholder's risk is necessary to qualify as a common-sense insurance regulation flies in the face of this Court's unanimous decision in *Ward*. *See* Pet. Br. at 30 n.13 (asserting that *Rush* and *Royal Drug* "make clear" that the common-sense inquiry requires that "a law is saved from preemption if and only if it is regulating an *insurance* practice," which "are the spreading and underwriting of a policyholder's risk."). Moreover, that argument suggests that administrative

regulations, like the notice-prejudice rule in *Ward*, solvency requirements, and other enforcement regulations fall outside the ERISA saving clause because they do not spread risk between the insurer and the insured. In the final analysis, the HMOs argue that state laws regulating insurance benefits can be saved, but that state laws regulating insurers' other activities cannot.

That argument simply defies common sense. Without doubt, HMO subscribers believe they have health insurance.[5] The subscribers, or their employer, pay money to an HMO and, in return, expect to receive medical treatment when such treatment is necessary. *See Pegram v. Herdrich*, 530 U.S. 211, 218 (2000). Common sense tells these subscribers that they have health insurance. *See Washington Physicians Serv. Ass'n v. Gregoire*, 147 F.3d 1039, 1046 (9th Cir. 1998) ("In the end, HMOs function the same way as a traditional health insurer: The policyholder pays a fee for a promise of medical services in the event that he should need them. It follows that HMOs (and HCSCs) are in the business of insurance."). Nevertheless, the HMOs assert that AWP laws are aimed at the administration of their HMO practices instead of at the benefits provided to their insureds. The HMOs then argue that ERISA only saves from preemption laws that concern the latter.

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[5] As this Court has recently recognized, "HMOs have taken over much business formerly performed by traditional indemnity insurers, and they are universally regulated as insurers under state law." *Rush*, 122 S.Ct. at 2163.

That argument rests principally on an artificially imposed distinction between laws regulating *insurers* and laws regulating *insurance practices*. This argument arises from the statement in *Royal Drug*, 440 U.S. at 211, concerning the exemption from federal antitrust laws being limited to the business of insurance, not the business of insurers. Pet. Br. at 15–17. The ERISA savings clause is not so limited.

The argued dichotomy between laws aimed at the insurance benefits versus laws aimed at the insurers' other activities runs afoul of *FMC Corp. v. Holliday*, 498 U.S. 1 (1987). There, the Court reviewed Pennsylvania's anti-subrogation law, a state law affecting plan administration. Citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court held that the law related to plans because it interfered with a uniform administrative scheme. *FMC Corp.*, 498 U.S. at 60. The law fell within the insurance saving clause, however, because it "directly controls the terms of insurance contracts by invalidating any subrogation provisions they contain." *Id.* at 60–61. The Court then concluded that the deemer clause exempts self-insured, but not insured, plans from state laws regulating insurance. "An insurance company that insures a plan remains an insurer for purposes of state laws 'purporting to regulate insurance' after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer." *Id.* at 61. Thus, so long as a state law regulates an insurer, it is excluded from the scope of the deemer clause and, therefore,

falls within the saving clause. The HMOs' reliance on *Royal Drug* for a dichotomy between laws regulating insurance practices and those regulating the insurers' other activities is misplaced.

2. ERISA's Reservation of State Laws that "Regulate Insurance" and the *Royal Drug* McCarran-Ferguson Definition of the "Business of Insurance" Are Not Synonymous.

Royal Drug is not dispositive of the issue in this case. The ERISA saving clause and the antitrust exemption of the McCarran-Ferguson Act are worded differently and serve different purposes. Saving clause analysis concerns a State's ability to regulate insurers, while McCarran-Ferguson concerns a limitation of competition in violation of antitrust laws. Applying the limits from the McCarran-Ferguson antitrust exemption to the ERISA saving clause mistakenly equates the two provisions.

Royal Drug addressed an antitrust claim against Blue Shield and several pharmacists for entering into an agreement that allegedly produced price-fixing of pharmacy drugs and led to a group boycott of those pharmacists who were not parties to the agreement. 440 U.S. at 207. Blue Shield asserted that the second clause[6] of 15 U.S.C. § 1012(b) exempted it from the antitrust laws. 440 U.S. at 210. The

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[6] The second clause provides "unless such Act specifically relates to the business of insurance."

goal of that provision was not to grant the States broad regulatory authority over the field of insurance; it was to protect the insurance business itself by "carv[ing] out only a narrow exemption . . . from the federal antitrust laws." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 505 (1993).

By contrast, the ERISA saving clause preserves broad authority for the States to regulate the insurance industry free of preemption. *Metropolitan Life*, 471 U.S. at 739. This is more similar to the first clause of § 1012(b). The first clause states "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." In *Fabe*, the Court distinguished the two clauses because "the first clause commits laws 'enacted ... for the purpose of regulating the business of insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws." 508 U.S. at 504. The *Fabe* Court then noted that the *National Securities* case was the only previous case addressing the first clause. *Id.* at 501 (citing *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969)). The *Fabe* Court emphasized that, unlike the second clause, even state laws indirectly aimed at regulating the insurance contract, such as laws regulating the insurer directly, fall within the first clause. 508 U.S. at 504. Essentially, state laws that regulate insurance from a common-sense view prevail under the first clause of §1012(b), but only those meeting all three McCarran-Ferguson factors survive under the second clause.

In *Ward*, this Court applied that analysis in the ERISA saving clause context. 526 U.S. at 367–68. First a common-sense analysis of the state law determines whether the saving clause applies. *Id.* Then, the three-factor test used to analyze the second clause of § 1012(b) acts as a relevant guidepost, but is not determinative. *Id.* at 373–74. It is relevant because a law that directly regulates the insured-insurer relationship, i.e., falls within the second clause, must fall within the first clause of § 1012(b). It is not determinative, however, because the ERISA saving clause, like the first clause of § 1012(b), captures *in*direct regulations—laws regulating an insurer's other activities. The HMOs reliance on the *Royal Drug* case incorrectly equates the ERISA saving clause with the second clause of § 1012(b).

Although the pharmacy agreement at issue in *Royal Drug* might be thought of as threatening free competition because it excluded certain providers from providing services to insureds, AWP laws do not. Quite to the contrary, proponents of AWP laws claim that these laws actually increase competition among the providers who have membership on an HMO's provider list. But the merits of that argument are of no consequence here, because the only question is whether Congress intended to preempt the States from enforcing those laws by providing a clause in ERISA that saves laws which "regulate insurance." The state *amici* think congressional intent to preserve the States ability to enforce insurance laws against insurers is based squarely on by the broad language of the ERISA saving clause. The HMOs ask this Court to reverse its prior decisions and hold

otherwise based on an antitrust exemption found in the McCarran-Ferguson Act. That request should be denied.

CONCLUSION

The Court should affirm the judgment of the Sixth Circuit.

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